

**Consolidated Edison Company of New York, Inc.  
and Utility Workers of America Local 1-2,  
AFL-CIO.** Cases 2-CA-25327, 2-CA-26288, 2-  
CA-26670, and 2-CA-28184

June 10, 1997

**DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS FOX  
AND HIGGINS

On May 30, 1996, Administrative Law Judge Howard Edelman issued the attached decision. The General Counsel and the Respondent filed exceptions, supporting briefs, and answering briefs, and the Respondent filed a reply brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified and set forth in full below.

The judge found that the Respondent violated Section 8(a)(1) of the Act on four occasions by denying bargaining unit employees their *Weingarten*<sup>1</sup> right to union representation at investigatory or fact-finding interviews which the employees reasonably believed might result in discipline. He also found that the Respondent violated Section 8(a)(1) by threatening a union steward with discipline if he did not leave one of those meetings. The Respondent has not excepted to those findings.

To remedy the violations, the judge recommended that the Respondent be ordered to cease and desist from further violations<sup>2</sup> at all its facilities in New York City and the greater New York metropolitan area and to post appropriate notices at all those facilities. He also recommended that the Respondent be required to mail letters to all unit employees, signed by its director of industrial relations, Ross Rimicci, describing their *Weingarten* rights.

1. The Respondent has excepted to the judge's imposition of unitwide cease-and-desist and notice-posting requirements and to the requirement that employees be notified of their *Weingarten* rights individually by letter. The Respondent contends that the judge erroneously found that it has knowingly and carefully crafted an unlawful policy of denying employees their *Weingarten* rights and therefore that he erred in imposing extraordinary remedies based on that finding (as well as on the repetitive nature of the violations). We find merit in the Respondent's exceptions.

<sup>1</sup> *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

<sup>2</sup> The judge inadvertently omitted the remedy for the unlawful threat to the steward. We shall add an appropriate remedy to the Order.

One of the violations arose from an August 1991 interview between the Respondent's supervisors and employee Michael Hunter. Although, as the judge found, Hunter reasonably believed the interview might lead to his being disciplined, he was denied representation by his steward for a portion of the interview. However, Hunter was not disciplined.

The Union wrote to Rimicci asking for information about the Hunter episode. After an investigation, Rimicci responded in a letter dated August 29, 1991, which stated in pertinent part:

It is my understanding that Mr. Hunter's interview . . . was investigatory and fact finding in nature. Since there was no intent on the Company's part at that time to discipline Mr. Hunter, Union representation was not required.

As the judge found, *Weingarten* entitles an employee to union representation on request at an investigatory interview which the *employee reasonably believes* might result in his being disciplined.<sup>3</sup> *Weingarten* therefore requires an employer to evaluate an investigatory interview situation from an objective standpoint—i.e., whether an employee would reasonably believe that discipline might result from the interview. Consequently, it is no answer to this allegation of a *Weingarten* violation that the Respondent's supervisors were only engaged in fact finding, or that they had no intention of imposing discipline on Hunter at the time of the interview. Neither of those conditions is inconsistent with Hunter's reasonable belief that discipline could result from the interview.<sup>4</sup>

The judge therefore correctly found that Hunter's *Weingarten* rights were violated. He also correctly found that the other three employees who asked for but were denied union representation in similar circumstances were unlawfully denied their *Weingarten* rights.

But the judge went further than that. He found that

Rimicci testified that his department, which he heads, sets Respondent's policy on such matters as *Weingarten* rights and that the Company's policy was that any initial investigation following an incident like the Hunter incident or like all of the subsequent incidents, set forth in the Complaint, are investigatory and fact finding in nature and that Union representation is not required. Rimicci further testified that the only time Union representation is required is after such fact finding investigatory interview causes Respondent to conclude that discipline is warranted. I find Rimicci's August 29, 1991 letter and his testimony at the trial

<sup>3</sup> 420 U.S. at 262.

<sup>4</sup> *Lennox Industries*, 244 NLRB 607, 614-615 (1979), *enfd.* 637 F.2d 340, 344 (5th Cir. 1981), *cert. denied* 452 U.S. 963 (1981).

to represent Respondent's Company wide labor relations policy.

In finding that Rimicci so testified, the judge plainly erred. As the General Counsel concedes in his brief, Rimicci did not testify in that fashion. He did not express any such policy as that inferred by the judge, and he did not indicate that such a policy had ever been communicated to the Respondent's supervisors and managers generally.

Rimicci did testify that he would be the one to state the Respondent's *Weingarten* policy if the question came up. He further testified that that policy is that an employee who wishes to have a steward present at either an investigatory interview or a disciplinary interview "certainly can have one."<sup>5</sup> That policy is set forth in the Respondent's *Supervisor's Guide to Disciplinary Actions for Weekly Employees*, which states in the section entitled "The Investigatory Interview" that "Employees are entitled to have a shop steward present upon request." It also states, in the section entitled "Union Representation," that "[a]n employee may elect to have a union representative present at any investigatory or disciplinary interview." Thus the Respondent's policy, as stated both by Rimicci and in the *Supervisor's Guide*, actually affords employees a right to union representation that goes beyond what *Weingarten* requires, in that it is not limited to interviews that the employee reasonably believes may result in discipline.

The *Supervisor's Guide* did not always state specifically that employees are entitled to union representation during investigatory interviews; that language was added in the current version, which was published in July 1993, after three of the four violations had taken place. Rimicci testified, however, that the policy had been in effect during the 12 years in which he had worked for the Respondent. He further testified that the employee relations department publishes a quarterly newsletter called *On the Line*, which is distributed to all members of management, and which has at times contained articles concerning *Weingarten* rights. The fall 1989 issue of *On the Line* contains an article by Rimicci which states the *Weingarten* rule correctly:

[The *Weingarten*] rule applies when Management conducts an investigatory and/or disciplinary interview with an employee that the employee reasonably believes might result in his or her discipline. In that situation, if the employee requests Union representation, he or she is entitled to have a shop steward or other Union official present for these interviews. . . . Under the "*Weingarten* Rule," there is no requirement to provide a shop

steward . . . in situations where no discipline may reasonably be expected to result.

An article in the spring 1989 issue states that "[e]mployees are entitled to have a steward present during an investigatory interview if they wish." Both of those articles were published before any of the events in this case took place.

Rimicci also testified that his department conducts numerous workshops for managers and supervisors on labor relations topics, including employees' *Weingarten* rights. Finally, he testified that he keeps a file of materials concerning *Weingarten* which he makes available to managers and supervisors who have particular questions about employees' *Weingarten* rights. Among those materials are a copy of the Supreme Court's *Weingarten* decision, several correct descriptions of the requirements of *Weingarten*, and a reference to the Fifth Circuit's decision in *Lennox Industries*, specifically stating that an employer must honor an employee's request for a steward even if the employer does not intend to discipline the employee as a result of the interview.<sup>6</sup>

The judge correctly found that supervisors and managers of the Respondent committed *Weingarten* violations in each of the four instances alleged in the complaint, and that Rimicci's August 29, 1991 letter to the Union reflected an erroneous interpretation of *Weingarten*. We note, however, that the four violations, each of which involved only one employee, took place over a period of 4 years in a unit that includes more than 11,000 employees. Moreover, although the letter of August 29 was written by the head of the department which sets the policy on such matters as *Weingarten* rights, there is no evidence that it was distributed to anyone other than the Union. The evidence shows that the written guidance materials that Respondent did distribute to its managers correctly described the *Weingarten* rule.

Under these circumstances, we are unable to agree with the judge's conclusion that the Respondent "carefully crafted a knowingly unlawful policy" of precluding union representation during investigatory interviews. Because there is insufficient evidence to indicate that the four violations found here were committed pursuant to a company policy<sup>7</sup> or otherwise reflected a pattern or practice of unlawful conduct, we do not find a unitwide remedy to be warranted. Accordingly, we shall follow the Board's usual practice and confine the injunctive and notice-posting require-

<sup>6</sup> It is not clear how many supervisors and managers received the materials in Rimicci's file.

<sup>7</sup> *Dow Jones & Co.*, 318 NLRB 574 (1995), cited by the General Counsel, is distinguishable from this case. There was no question in *Dow Jones*, as there is here, whether the employer had a particular policy. The policy in *Dow Jones* was clearly described as such and, as such, was disseminated to the company's managers. *Id.* at 585.

<sup>5</sup> Rimicci's testimony, as summarized here, is uncontroverted. The judge did not discuss it, but we find no reason to infer that he discredited it. He did not discredit Rimicci generally.

ments of the Order to the facilities at which the violations were committed.<sup>8</sup> We also find it unnecessary to require the Respondent to mail letters to unit employees explaining their *Weingarten* rights; indeed, because there is no showing that traditional notice posting would be inadequate to apprise employees of our decision, we shall not require the notices to be mailed.

2. The General Counsel has excepted to the judge's failure to find that the Respondent breached an informal settlement agreement in Case 2-CA-25327 (the Hunter case) and that the Board rejected a later proposed settlement in part because of the earlier breach; to his refusal to allow the General Counsel to introduce evidence concerning a fifth episode in which the Respondent assertedly denied employees their *Weingarten* rights; and to his failure to find that the Respondent's managers and supervisors frequently transfer among locations. The General Counsel contends that those factors all support the extraordinary remedies recommended by the judge.

We find no merit in the General Counsel's exceptions, because we find that none of those considerations would require us to reach a different result. That the Respondent breached the settlement agreement in Case 2-CA-25327 does not change the number or seriousness of the violations found.<sup>9</sup> We agree with the judge's suggestion at the hearing that evidence of one additional (unalleged) violation would not require more drastic remedies. And while the evidence that a few managers and supervisors have transferred among facilities lends some weight to the General Counsel's argument for broader remedies, in view of all the circumstances discussed above, we remain unpersuaded that such remedies are necessary or appropriate.

#### ORDER

The National Labor Relations Board orders that the Respondent, Consolidated Edison Company of New York, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denying to any bargaining unit employee at its Van Ness service center in the Bronx, its 59th Street and West 54th Street facilities in Manhattan, or its 222 First Street facility in Brooklyn, the right to be represented on request by Utility Workers of America,

<sup>8</sup> See *Rose-Terminix Exterminator Co.*, 315 NLRB 1283, 1289 (1995). We note that there is no evidence, and no contention, that employees at other facilities generally were aware of these violations. In this regard, although Rimicci testified that employees transfer between facilities "on occasion," there is no evidence that they do so frequently.

<sup>9</sup> The fact that the Board rejected a later proposed settlement in part because of the earlier breach is simply irrelevant to the remedy ultimately imposed. We therefore deny the Respondent's motion to strike from the General Counsel's exceptions all references to the later settlement discussions.

Local 1-2, AFL-CIO (the Union), at any investigatory interview that the employee reasonably believes might result in disciplinary action.

(b) Threatening to discipline any union representative at its Van Ness facility if he or she does not leave an investigatory interview at which a unit employee who reasonably believes the interview might result in discipline has requested union representation.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at the above facilities copies of the attached notice marked "Appendix."<sup>10</sup> Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at those facilities at any time since September 26, 1991.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

#### APPENDIX

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

<sup>10</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT deny to any bargaining unit employee at our Van Ness service center in the Bronx, our 59th Street and West 54th Street facilities in Manhattan, or our 222 First Street facility in Brooklyn, the right to be represented on request by Utility Workers of America, Local 1-2, AFL-CIO at any investigatory interview which the employee reasonably believes might result in disciplinary action.

WE WILL NOT threaten to discipline any union representative at our Van Ness facility if he or she does not leave an investigatory interview at which a unit employee who reasonably believes the interview might result in discipline has requested union representation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

#### CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

*Burt Pearlstone, Esq.* for the General Counsel.

*David J. Reilly, Esq.,* for the Respondent.

*Kelvin G. Jenkins, Esq.,* for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was heard before me on October 24, 30, and 31, 1994, and November 1 and 8, 1995, in New York, New York.

Pursuant to various charges filed by Utility Workers of America Local 1-2, AFL-CIO (the Union) filed against Consolidated Edison Company of New York, Inc. (the Respondent), Region 2, on behalf of the General Counsel issued complaints on June 30, 1993 (Cases 2-CA-25327 and 2-CA-26288), on September 30, 1993 (Case 2-CA-26670), and on May 12, 1995 (Case 2-CA-28184). All of these complaints allege various *Weingarten* violations.<sup>1</sup>

On the entire record, including my observation of the demeanor of the witnesses, and the briefs filed by the parties, I make the following

##### FINDINGS OF FACT

Respondent is a domestic corporation with offices and facilities located throughout the five boroughs comprising New York City. It is a public utility engaged in providing electrical power to the public, and to businesses in New York City, and Westchester County, New York. Respondent, in the course and conduct of such business, derives gross revenues in excess of \$1 million, and purchases and receives at its New York facilities goods, equipment, and other materials

valued in excess of \$50,000, directly from points outside the State of New York.

It is admitted, and I conclude, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and 7 of the Act.

It is also admitted, and I conclude, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Respondent and the Union have been parties to a long series of collective-bargaining agreements covering all of Respondent's production and maintenance employees. These agreements all contain provisions for grievances and arbitration procedures.

Michael Hunter is a union employee working for Respondent as a customer field representative at Respondent's Van Ness service center in Bronx, New York. His job duties are essentially reading electric meters in homes, apartment houses, and various commercial facilities.

Sometime in June 1991, Hunter lost a "Morse Lock Key." This is a master key which opens Respondent's gas and electric meters. These keys can be used to effectively "start" services from Respondent, and as such have high money value "on the street." The loss of those keys is a serious matter which can result in discipline. Hunter received a 1-day suspension for this lost key.

Shortly, after this suspension, Hunter tested positive in a random drug test routinely administered to Respondent's employees. He was required to attend a drug rehabilitation program.

Sometime in early August 1991, while on the job at a Bronx apartment building, Hunter credibly testified that he was held up, and his "Morse Lock Key" and other equipment he was carrying taken from him.

The day after the robbery Hunter reported to work and was informed that he was going to be interviewed by Respondent's security personnel.

Shop Steward Ken Leonardo, the steward at the Van Ness facility had learned of the robbery the day before and met with Hunter when he reported to work the next day, and appeared to be present with Hunter during his security interview. Hunter and Leonardo credibly testified that Hunter was worried about discipline resulting from this interview because of his recent loss of a similar key and his failed drug test. Hunter agreed that Leonardo should be present during the security interview.

The security officer eventually arrived at the Van Ness facility. Respondent has a central security office. The security officer met with Jack Gaffney, a manager in Bronx customer operations. The security officer introduced himself to Hunter. Leonardo and Gaffney were present. Hunter then specifically requested that Leonardo be present during his interview.<sup>2</sup>

<sup>2</sup> Gaffney testified that Hunter did not request Leonardo's presence, but that Leonardo just "invited himself in." I do not credit such testimony. Hunter and Leonardo impressed me as credible witnesses. I was impressed by their demeanor. They were both forthright in response to questions on both direct and cross-examination. This security interview was obviously a very serious matter and I find it unbelievable that the security officer and general manager would have allowed Leonardo to be present in such a serious interview unless Leonardo specifically identified himself and Hunter requested his presence.

<sup>1</sup> *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

The security officer interviewed Hunter in a closed office. Gaffney and Leonardo were present. The interview was intense; the security officer asking the same questions at different times during the interview, but phrased differently, in what appeared to me as a cross-examination type interview.

At about an hour into the interview, John Stack, manager of human resources for the entire Bronx, and Gaffney's supervisor, walked into the office where the interview with Hunter was taking place. He saw Leonardo present and asked what he was doing here. Leonardo told him he was representing Hunter in his capacity as shop steward. Stack ordered Leonardo to leave stating that this interview was not a "disciplinary" interview. When Leonardo resisted leaving, Stack told him he would be suspended if he did not leave. Leonardo then left the security interview of Hunter continued to conclusion without Leonardo's presence.

After Leonardo left the interview he telephoned Jerry Waters, assistant business manager of the Union, and told him what had happened. Waters then telephoned Gaffney to complain about Leonardo's ejection from the security interview. Gaffney told Waters that he agreed with Stack's position. Gaffney told Waters that the Hunter interview was a "fact finding investigatory interview" and as such, Leonardo had no right to be present.<sup>3</sup> Waters then phoned Stack, who told him that Leonardo had no right to be present during the Hunter interview because it was a "factfinding" interview.

Waters next telephoned Ross Rimicci, director of industrial relations of Respondent's entire operation. Waters explained that Stack's action was denied by Hunter's *Weingarten* rights.<sup>4</sup> Rimicci promised to investigate.

Rimicci replied to Water's complaint by a letter dated August 29, 1991, wherein he stated that the Hunter interview "was investigatory and fact finding in nature" and that "since there was no intent on the Company's part at that time to discipline Mr. Hunter, union representation was not required."

Rimicci testified his department, which he heads, sets Respondent's policy on such matters as *Weingarten* rights and that the Company's policy was that any initial investigation following an incident like the Hunter incident or like all of the subsequent incidents, set forth in the complaint, are investigatory and factfinding in nature and that union representation is not required. Rimicci further testified that the only time union representation is required is after such factfinding investigatory interview causes Respondent to conclude that discipline is warranted. I find Rimicci's August 29, 1991 letter and his testimony at this trial to represent Respondent's companywide labor relations policy.

It was ultimately determined that Hunter had been robbed, and no discipline was imposed.

Kelvin Paul is employed by Respondent as a control room operator at Respondent's 59th Street Manhattan facility. This facility is a steam electric unit providing electric power to the New York City subways and steam to commercial customers.

On January 6, 1993, Paul was working his midnight shift when water began flooding out of the boiler fuel pump of the steam generating plant. This resulted in a "water ham-

mer" condition, a very serious and extremely hazardous situation. The only employees working the night shift at this time were Paul, a senior employee, and his assistant. It was necessary to shut down the boiler to prevent a possible explosion.

Plant Manager Harry Morrison arrived at the plant at 6:30 a.m. and immediately summoned Paul. Morrison sat Paul down in a conference room and ordered him to write down exactly what had happened. At this point Paul who was frightened stated, "I need a Union Steward." Morrison replied, "You don't need a Union Steward right now." I find Morrison's statement to be consistent with Respondent's policy as explained by Rimicci as set forth above.

Morrison left the conference and Paul then telephoned his union steward, Frank Lentino. Paul explained what happened and asked Lentino to come down quickly because he was afraid he was going to be suspended.

Paul returned to the conference room. Shortly thereafter, Morrison and Personnel Administrator James Quackenbush entered. Observing Paul in a frightened and anxious state Quackenbush had a pen and a writing pad with him and told Paul to relax and to "tell us what happened and I will write it down." Paul replied, "I need a Union Steward." Morrison replied, "You do not need a Union Steward I will tell you when you need a Steward." At this point Lentino arrived at the conference room and told Quackenbush and Morrison that his presence had been requested. Morrison told Lentino he was not needed, that this was a factfinding investigation. Morrison then slammed the door in Lentino's face. Lentino did not attempt to reenter.

I find the testimony of Lentino and Paul entirely credible. I was impressed with their demeanor. They answered questions put to them on both direct and cross-examination in a forthright manner in detail. Their testimony was mutually corroborative. Moreover, the actions and statements of Quackenbush and Morrison are entirely consistent with the Respondent's overall labor policy described above.

When Lentino left Quackenbush and Morrison questioned Paul about the facts surrounding the "water hammer" and took written notes.

The following night Paul encountered Quackenbush and Morrison during his workshift. Morrison questioned Paul further about the "water hammer" incident. Paul again replied that he would need a union steward. Morrison replied that he didn't need a steward because the investigation was still ongoing, and that if he was going to suspend him he would tell him to bring a steward, and if he was not going to suspend him, he would not need a steward. Again, Morrison's statements are consistent with the Respondent's admitted policy.

On January 12, 1993, Paul was summoned to a meeting attended by Superintendent of Operations Randy Johnson, Quackenbush, Paul, and Shop Steward John McGraff. Johnson informed Paul he would be suspended 1 day because of his negligent work performance on January 6, 1993. McGraff protested the suspension pointing out that Paul had been denied a shop steward during the interviews with Paul where the facts leading to this suspension were obtained although Paul had repeatedly requested a shop steward. McGraff then demanded to know why Paul was denied a shop steward. Quackenbush responded, "We wanted to get the truth from Mr. Paul."

<sup>3</sup> Waters testified in a credible manner. Moreover, his testimony was not contradicted by Gaffney.

<sup>4</sup> *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975).

I conclude that the above statement by Quackenbush is not only consistent with Respondent's admitted labor policy, but explains the reason for such policy.

Scott McGrath was employed by Respondent as a meter reader working out of one of the facilities in Brooklyn, New York.

On the evening of April 29, 1993, after completion of his shift he happened to be in an area where he met a few other meter readers who were on duty. McGrath, off duty, was not in uniform. The other meter readers dispersed to their routes, except for one female meter reader. McGrath was talking to her, and at some point noticed a group of strange men whistling at her. McGrath decided to accompany her on her rounds to prevent further harassment. McGrath would wait on the sidewalk in the front of the building while the female coworker went inside to read the meters.

At some point during these rounds Dorian Everett, the Brooklyn facility supervisor, drove up and stated that he had been contacted by John Sobrino, McGrath's general operating supervisor pursuant to a customer's complaint. Everett told McGrath that Sobrino wanted to know what McGrath was doing there. Everett told McGrath that he should not be there and could he could get into trouble.

On April 30, both Sobrino and Robert Weiner, section manager for the Brooklyn meter reading operations, met with McGrath. Weiner testified that he viewed a situation where a meter reader out of uniform is assisting another meter reader is a serious infraction of Respondent's rules, because of robberies by individuals impersonating meter readers. Weiner admitted that investigation of such complaint could lead to disciplinary action.

On April 30, in the afternoon, following the initial interview described above, Weiner and Sobrino summoned McGrath into Sobrino's office and told him they wanted to further speak to him about the April 29 incident. McGrath asked, "Do I need anybody here with me?" Weiner responded, "No you don't need a shop steward present." Weiner and Sobrino then questioned McGrath in detail about why he was there and all the facts surrounding the incident.

Both Sobrino and Weiner disputed McGrath's account of what transpired in Sobrino's office on the afternoon of April 30, 1993. Both asserted that McGrath was not summoned by either of them and that he just walked into Sobrino's office unannounced. Both Sobrino and Weiner further denied asking McGrath even so much as one question about the incident the night before. Both asserted in their testimony that McGrath began an explanation of his own accord and that the entire encounter was very brief. Weiner claimed that he left before McGrath left, in that he was in a rush to get to another meeting. Sobrino denied that McGrath asked if he needed somebody, or that either Sobrino or Weiner told McGrath that he did not need a shop steward.

I credit the testimony of McGrath. I was very impressed with his demeanor, he was very forthright in questions put to him during both direct and cross-examination. Further, I discredit the testimony of Weiner and Sobrino that McGrath would burst into their office unannounced and confess as utterly unbelievable.

Sobrino further testified that sometime later that week he did an investigatory interview of McGrath with a shop steward present. Significantly, Sobrino offered this testimony only after he was shown Respondent's Exhibit 4, the written

disciplinary interview of May 10 described below. Sobrino was able to provide no details of this asserted investigatory interview which he said took place the week of May 3. He just repeated that the same individuals were present at that time as were present for the May 10 disciplinary interview. Respondent offered no written documentation of this asserted investigatory interview.

In view of the lack of any documentation of such alleged meeting, and my generally unfavorable impression of Weiner's and Sobrino's credibility, I conclude no such interview took place.

On May 10, with the investigation and factfinding interviews complete McGrath was called to a disciplinary interview. For the first time Shop Steward Frank DiSimons was present and Sobrino and Supervisor Greg Grecco were present for Respondent. McGrath was told he was being suspended for 1 day and a warning letter placed in his file.

McGrath filed several separate grievances after he was suspended. One grievance protested the suspension on just-cause grounds. The other grievances were filed against John Sobrino and Robert Weiner, and protested the denial of a shop steward to McGrath on April 30 when they jointly questioned McGrath about the incident which resulted in his suspension.

At some time before July 1993, McGrath was contacted by the Union regarding his allegations that he was denied union representation by Sobrino and Weiner on April 30, 1993. The Union filed the instant charge in Case 2-CA-26670 on July 2, 1993, protesting that denial as an unfair labor practice. Several weeks later, on July 16, 1993, Union Business Agent Navarro and Respondent General Manager Caselli settled the suspension grievance at the third step of the parties' grievance procedure. The written settlement agreement (R. Exh. 2) rescinded the 1-day suspension, but kept the written warning in McGrath's file.

Pablo Hernandez was a meter reader for Respondent working out of the West 54th Street facility in Manhattan, New York.

On January 31, 1995, the night supervisor for the West 54th Street facility received a customer complaint that the meter reader had not shown up as scheduled to turn off the electricity at one of the apartments. Velez had been assigned to do this.

When Hernandez returned to West 54th Street at the end of his rounds, he told him about the customer complaint. Hernandez said he had gone to the facility, but was denied entry by the doorman. The next day, February 1, Hernandez was summoned to Supervisor Vito Mannino's office. Mannino asked Hernandez to accompany him in a car and point out the location where he was allegedly refused admittance. Hernandez did so.

On February 2, Mannino told Hernandez that General Operating Supervisor Joe Velez wanted to see him. They went to Velez' office. Hernandez asked Velez, "Do I need a shop steward." Velez stated, "No you don't need one, this is just a fact finding." Then they discussed the facts surrounding the January 31 incident.

On February 6, Supervisor Anthony Ibelli told Hernandez that Velez wanted to see him. Hernandez entered Velez' office with Ibelli and told him, "I would like a shop steward." Velez replied, "You don't need one, but you'll need one down the road." Velez emphasized that this was "not a dis-

ciplinary interview." Velez then questioned Hernandez about the January 31 incident again.

Velez consistently testified that that he strongly suspected Hernandez was lying and he was attempting to elicit facts for which Hernandez could be disciplined.

On February 9, Velez met with Hernandez and Shop Steward Debbie Thomas. Velez informed Thomas and Hernandez that as a result of their investigation Hernandez would be disciplined.

On February 23 Hernandez was informed he was being suspended for 3 days.

#### Analysis and conclusions

In *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, the Supreme Court upheld the Board's holding that Section 7 of the Act protects an employee's right to have union representation at an investigatory interview which the employee reasonably believes might eventually result in disciplinary action. These "Weingarten" rights inhere in both "investigatory" and "disciplinary" interviews.

The test for determining whether an employee reasonably believes that the interview might result in disciplinary action is measured by objective standards under all the circumstances of the case rather than by the employee's subjective motivation. *Weingarten*, supra at 257 fn. 5; *United Telephone Co. of Florida*, 251 NLRB 510, 513 (1980).

*Weingarten* rights arise only when the employee requests representation. *Weingarten*, supra at 257. However, the Board has made clear in a series of cases that such requests, to trigger *Weingarten* rights are liberal, and need only be sufficient to put the employer on notice of the employee's desire for union representation. For example, the request can be phrased as a question, such as in *Southwestern Bell Telephone Co.*, 227 NLRB 1223 (1977), where the Board held that one employee's question asking the supervisor "if they should obtain union representation" was sufficient to put the employer on notice as to the employee's desires. *Id.* at 1227, 1223. In that same case, another employee's question: "I would like to have someone there that could explain to me what was happening" was also deemed sufficient. *Id.* at 1223. Similarly, in *Illinois Bell Telephone Co.*, 251 NLRB 932, 938 (1980), affd. 674 F.2d 618 (7th Cir. 1982), a question by an employee asking the supervisor if she should have someone present from the union was deemed both a request for advice and an expression of a desire for union assistance, sufficient to trigger her *Weingarten* rights. Accord: *New Jersey Bell Telephone Co.*, 300 NLRB 42, 48-50 (1990); *Postal Service*, 256 NLRB 78, 80-82 (1981). In *Bodolay Packaging Machinery*, 263 NLRB 320, 325-326 (1982), a question by an employee to a supervisor asking if he needed a witness was deemed sufficient. This case is important since several of the employees under investigation asked questions almost identical to this question.

Under *Weingarten*, the employee's request for union representation need not be repeated at the interview if it was made to the person conducting the interview prior to the interview, *Lennox Industries*, 244 NLRB 607, 608 (1979); *Amoco Oil Co.*, 278 NLRB 1, 8 (1986), or if communicated by another person to the person conducting the interview prior to the interview. *Consolidated Freightways Corp.*, 264 NLRB 541, 542 (1982).

Finally, inasmuch as the shop steward or other union representative representing an employee at an investigatory interview is engaged in protected activity, any attempt by the employer to interfere with or coerce the representative in the exercise of those rights is violative. Thus, an effort to totally silence a union representative at a *Weingarten* interview is a violation. *Southwestern Bell Telephone*, 251 NLRB 612, 613 (1980), enf. denied 667 F.2d 470, 474 (5th Cir. 1982). Similarly, a threat to discipline or discharge a union representative for exercising *Weingarten* rights is unlawful. *Good Hope Refineries*, 245 NLRB 380, 384 (1979), enf. 620 F.2d 57, 59 (5th Cir. 1980).

Director of Industrial Relations Rimicci admitted that he is the individual who sets companywide policy on all labor policies, including *Weingarten* rights. Such policy was clearly set forth in Rimicci's August 29, 1991 letter which he admitted is Respondent's current policy. The letter was in response to the Hunter case and states in pertinent part that the interview "was investigatory in nature." And that "Since there was no intent on the Company's part at that time to discipline Mr. Hunter, union representation was not required."

Such respondent-wide policy not only flies in the face of the *Weingarten* principles, but is analogous to a policy when a defendant is not entitled to a lawyer during a trial when the factfinding process occurs, but only if the defendant is found guilty for the purpose of mitigating the sentence.

I conclude Rimicci's policies were followed in each of the individual cases described above.

In the Hunter case, Hunter had an objective that discipline might result from his being robbed of his Morse lock key. Shortly before this occurrence, he had lost a Morse lock key and several days later failed a drug test.

Although Shop Steward Leonardo was originally admitted to the investigation and factfinding meeting, John Stact ordered Leonardo to leave when he arrived. Leonardo did so and the factfinding meeting continued without Leonardo's presence. There is no evidence that Hunter was ever given the chance to waive his *Weingarten* rights.

Moreover, the supervisor threatened the shop steward with unspecified discipline . . . he left the interview.

I conclude that Respondent, in accordance with its companywide policy violated Section 8(a)(1) of the Act by denying Hunter his right to be represented by his shop steward, and threatening Shop Steward Leonardo with discipline if he did not leave the factfinding investigation. I further conclude such conduct was in accordance with Respondent's companywide policy.

In the Kelvin Paul case, there was no question that Paul believed that Respondent's investigation could result in discipline. The accident was a serious accident which could only have been caused by carelessness or negligence. Paul was the senior employee on the water. There was only one other employee present. Quackenbush admitted that the outcome of questioning Paul could lead Respondent to conclude Paul was negligent which would result in discipline. The credible evidence establishes that Paul said, "I need a steward," twice. This was admittedly an investigation interview. Each time such request was denied.

Incredibly Supervisor Morrison testified Paul did not request a steward. However, his testimony is contradicted by Respondent's position letter which states, "The Charging

Party asked for a shop steward and one in fact came to the room where the charging party [Paul] was talking to supervision, but was not allowed to participate." (G.C. Exh. 7 at p. 1, par. 4) Such statements are admissions. *United Technologies Corp.*, 310 NLRB 1126, 1127 fn. 1 (1993).

In addition to the position statement, Respondent's own written report of Paul's disciplinary interview the following week, supports a finding that there was no question at that time but that Paul had requested a shop steward on the earlier occasion. The report (R. Exh. 4) references the discussion at the disciplinary interview about the alleged *Weingarten* violation the week before. While the report discusses the Company's asserted reasons for denying Paul a steward on January 6, 1993, nowhere does it even suggest that Paul had not properly requested a steward at that time or that the Company was not at the time sufficiently apprised of his desire for union representation. Clearly, this report constitutes as admission by omission, since the only reason cited for denial of a steward was that they wanted to get to the truth fast and did not have time to wait. The omission in the report is supported by the mutually corroborative testimony of John McGraff and Kelvin Paul, that Quackenbush, at the January 12, 1993 disciplinary interview, stated that the reason they denied Paul a steward on January 6 was a desire to have Paul tell the truth. This would have been the Respondent's overall companywide policy in this area.

Respondent's affirmative defense in the Paul case is that any delay which might have been caused by permitting union representation would have caused an unreasonable risk to the plant, its employees, and the public. However, Lentino, by all accounts, appeared minutes after the interview started and there is thus no evidence of any delay, for example, occasioned by having to search for a shop steward. Paul had contacted Lentino himself while Morrison went to get Quackenbush to assist him. Thus, I reject Respondent's argument.

In the McGrath case, he knew he was in real trouble when Supervisor Everett drove up to where he was assisting another meter reader. Everett told him he was there because Sobrino had received a complaint from a customer. Everett pointed out that he was out of uniform and that he could get into trouble.

The credited evidence established that on April 30, in the afternoon, Sobrino and Weiner summoned McGrath into their office and told him they wanted to speak to him about the incident. McGrath asked, "Do I need anybody with me." Weiner perfectly aware of what he was asking told him he didn't need a shop steward.

I conclude that the April 30 investigation was a factfinding investigation which obviously could have led to trouble. McGrath asked for a shop steward but was denied one. I conclude by such conduct a *Weingarten* violation is established and that Respondent violated Section 8(a)(1) of the Act.

Respondent's affirmative defense to the McGrath case is that the case is barred by a grievance and should be deferred to that settlement. Respondent bears the burden of proving its affirmative defense and has adduced no evidence that the Union settled either of the *Weingarten* grievances filed originally by McGrath. The sole document introduced to prove Respondent's defense is the July 16, 1993 grievance settlement form entitled "Brooklyn Grievance Settlement" (R.

Exh. 2). This document plainly settled the suspension grievance which McGrath filed, but states nothing whatsoever about any alleged denial of a shop steward. It is undisputed that McGrath filed four separate grievances, only two of which involved the alleged *Weingarten* violation. Moreover he testified credibly that he was contacted by the Union at some point prior to the summer of 1993 in order to file an unfair labor practice charge concerning the *Weingarten* violation. That charge, in Case 2-CA-26670, was filed on July 2, 1993. It is inconceivable that either party can be held to have "settled" that unfair labor practice charge 14 days later by means of a grievance settlement form which neither references the charge nor states anything about a *Weingarten* violation or a denial of a shop steward. To the contrary, Union Assistant Business Manager Jerry Waters, who is the union official primarily responsible for filing the instant charges, testified without contradiction that he coordinates unfair labor practice charges filed by the Union against Respondent. He testified that he has settled numerous such charges, and in all cases the specific charges were referenced by case number, with a letter to the company and the Board specifically withdrawing the charge. He stated that the parties have never settled such Board charges using the standard grievance settlement form used to settle the suspension grievance. Respondent's sole witness on this issue, Manager Marilyn Caselli, testified that she settled the suspension grievance on July 16, 1993, and candidly admitted that she did not even recall whether there was another grievance involving denial of union representation. Nor did she recall any specifics of her discussions with Union Business Agent Felix Navarro leading to the settlement.

Respondent clearly has not shown that it has settled the unfair labor practice charge in Case 2-CA-26670. Nor is there any ground for deferral to the parties' grievance and arbitration procedures. Respondent has introduced no evidence that such a *Weingarten* violation is cognizable under the parties' collective-bargaining agreement or even under their past practice in light of that agreement. To the contrary, Jerry Waters testified without contradiction that the contract contains no provisions concerning employees' *Weingarten* rights.

The *Weingarten* violations in the Hernandez case, are clearly established and supported by evidence admitted by Respondent's witnesses, in particular Joe Velez and Vito Mannino. In this regard, Velez, the manager who conducted the *Weingarten* interviews of Hernandez, conceded that he suspected that Hernandez had lied and had in fact falsified records regarding a customer complaint that Hernandez had not made a scheduled visit to turn on electric service. Velez further conceded that such falsification and dereliction of duty is a serious infraction, which can and should result in discipline. Thus, there is no doubt that Hernandez had objective grounds for believing discipline would result from Velez' investigatory interviews of him on February 2 and 6, 1995. With respect to the February 2, 1995 interview, both Velez and Mannino, the other supervisor present, corroborated Hernandez' testimony that he asked, "Do I need a shop steward?" It is undisputed that Velez denied Hernandez a steward without first offering him a choice of continuing without a representative voluntarily or forgoing any interview at all.

I therefore conclude on disputed facts, a clear *Weingarten* violations is established, and that Respondent violated Section 8(a)(1) of the Act.

Counsel for the General Counsel urges that a remedy be fashioned that is commensurate with the repetitive nature of Respondent's violations and the apparent unitwide policy regarding *Weingarten* rights. Such a remedy should at a minimum, include a cease-and-desist order covering all of Respondent's bargaining unit employees at its locations in New York City and Westchester County. Second, the remedy should include a unit wide notice posting at those same locations. I would agree with General Counsel's position, except that I would additionally require Respondent to mail each unit employee covered by the Union's letter explaining their *Weingarten* rights. The letter should be signed by Rimicci since he instituted this companywide policy, which existed at the time of the trial. See the *Miller Group* 310 NLRB 1235

fn. 4 (1993); *John J. Hudson, Inc.*, 275 NLRB 874 fn. 7 (1985). If he has trouble composing such letter, he might refer to counsel for the General Counsel's excellent brief. I recommend such remedy because Respondent, at the highest level, the director of industrial and labor relations, has carefully crafted a knowingly unlawful policy of precluding union representation at the time it is most necessary, during the factfinding investigations which may well lead to discipline. As one supervisor explained, Respondent does this so that it can get the truth. However, such policy unlawfully deprives employees of their *Weingarten* rights, their due-process rights of representation. It is because of the intentional and flagrant nature that I believe each unit must have their *Weingarten* rights explained by the director of industrial labor relations who formulated such unlawful policy.

[Recommended Order omitted from publication.]